No. 82-526

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1982

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

BOARD OF TRADE OF THE CITY OF CHICAGO AND CHICAGO BOARD OPTIONS EXCHANGE, INC.

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

BOARD OF TRADE OF THE CITY OF CHICAGO, CHICAGO BOARD OPTIONS EXCHANGE, INC., AND THE OPTIONS CLEARING CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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Respondent Board of Trade of the City of Chicago (CBOT) acknowledges that "the case now appears to be moot as a result of legislative and regulatory actions" subsequent to the decision of the court of appeals. Br. in Opp. 11; see *id.* at 6. Indeed, the Seventh Circuit, sitting en banc, denied CBOT's motion for reconsideration of the order denying a stay of the SEC's new orders (No. 82-2659, Oct.

21, 1982) "because [recent legislation] grants the Securities and Exchange Commission jurisdiction under the securities laws to authorize options on government securities * * *."

"The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); see, e.g., Board of Governors of the Federal Reserve System v. *Security Bancorp and Security National Bank*, No. 81-176 (Dec. 14, 1981); *State Fair* v. *Consumer Product Safety Commission*, No. 81-384 (Nov. 9, 1981). Nonetheless, CBOT urges (Br. in Opp. 6-11) the Court to deny the petition for certiorari because petitioner had an opportunity to litigate these cases in the court of appeals. That contention ignores the reason for vacating a judgment that becomes "unreviewable because of mootness" (340 U.S. at 41). Moreover, it is doubtless exceedingly rare that a petitioner is denied a full and fair opportunity to litigate in the court of appeals. Accepting CBOT's argument, therefore, would not only require rejection of the *Munsingwear* "dictum" (Br. in Opp. 7), but also require rejection of many of this Court's subsequent cases that follow *Munsingwear*.

We agree, however, that *Munsingwear* should not be read to require this Court to vacate every judgment that becomes moot pending disposition of a petition for a writ of certiorari. Only if the issues presented by the petition might otherwise warrant review in this Court should the judgment of the lower court be vacated when mootness denies the Court an opportunity to consider the issues raised.[1]

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[1]The reasons for using this standard are fully set out in the Brief for the United States in Opposition at 4-8, *Velsicol Chemical Corp.* v. *United States*, 435 U.S. 942 (1978), upon which CBOT mistakenly relies

CBOT does not dispute the tremendous practical importance of the questions presented, arguing instead (Br. in Opp. 7 n.10, 11 n.20, 17 n.34) that the questions have been clearly resolved by Congress and, therefore, do not warrant review in this Court. In light of the recent legislation, the questions presented obviously do not warrant review. Indeed, this Court has no power to decide moot cases. E.g., North Carolina v. *Rice*, 404 U.S. 244, 246 (1971). For present purposes, however, the pertinent inquiry is whether the Court might have granted the petition but for the legislation.

The court of appeals held (Pet. App. A-37 to A-46) that an option on a security is not a "security" within the meaning of Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. 78c (a)(10).[2] We have already explained (Pet. 5-15) that the court's conclusion is inconsistent with the language of the statute and a substantial body of judicial opinion, and disregards commercial practice as well as congressional ratification of the Securities and Exchange Commission's construction of the securities laws over the

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(Br. in Opp. 10 & n.18). If the Court would have granted the petition, the petitioner should not be penalized solely because the case becomes moot before the Court acts on the petition. If the Court would have denied the petition, the respondent should not be denied the benefit of the lower court decision solely because the case becomes moot before the Court acts on the petition. Thus, disposing of cases that become moot while petitions for certiorari are pending in light of the disposition the Court would otherwise have made of the petition is fair to both parties and consistent with the reason for vacating unreviewable judgments.

[2]"Pet. App." refers to the appendix to the petition for a writ of certiorari in *Chicago Board Options Exchange, Incorporated and The Options Clearing Corporation* v. *Board of Trade of the City of Chicago*, No. 82-327, which also seeks review of the decisions of the Seventh Circuit in these cases.

past decade. CBOT only reiterates the analysis of the court of appeals.[3]

CBOT all but abandons the reasoning of the court of appeals on what CBOT (Br. in Opp. 16) characterizes as "the major holding of the case." CBOT makes no attempt to defend the court's conclusion that options on GNMA securities are within the exclusive jurisdiction of the Commodity Futures Trading Commission because they "involv[e]" (7 U.S.C. (Supp. V) 2) futures contracts on GNMA securities. See Br. in Opp 15. Instead, CBOT argues (Br. in Opp. 12) that Section 4c of the Commodity Exchange Act (7 U.S.C. (Supp. V) 6c) "bans options on commodities—without limitation as to whether the commodity is also a security—unless traded pursuant to the regulations of the CFTC * * *." As the court of appeals correctly concluded (Pet. App. A-16 to A-17), however, Section 4c of the Commodity Exchange Act (7 U.S.C. (Supp. V) 6c) is applicable to options on securities only if such options are within the CFTC's exclusive jurisdiction. In other words, the SEC's jurisdiction to regulate trading in securities is unaffected by the expanded definition of the term "commodity," except (7 U.S.C. (Supp V) 2; emphasis added) "with respect to accounts, agreements (including * * * option[s] * * *), and transactions *involving*" futures contracts. See H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 28 (1974). Neither the court of appeals nor CBOT has offered any plausible explanation of how an option on a GNMA security "involv[es]" a futures contract on a GNMA security in any sense that Congress could have intended.

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[3]One point warrants repetition. Contrary to CBOT's argument (Br. in Opp. 18), the origin of Section 9(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78i(b)) makes it plain that the provision implies nothing about the status of options as securities under Section 3(a)(10) of the Act (15 U.S.C. 78c(a)(10)). See Pet. 11-12 n.10.

For these reasons, and those stated in the petition and the suggestion of mootness, the petition for a writ of certiorari should be granted, the judgments of the court of appeals vacated, and the cases remanded with directions to dismiss the petitions for review as moot.

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